No. 02-626

In The
# Supreme Court of the United States

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## AMICUS CURIAE BRIEF OF TONGUE & YELLOWSTONE RIVER IRRIGATION DISTRICT, TONGUE RIVER WATER USERS' ASSOCIATION, AND NORTHERN PLAINS RESOURCE COUNCIL, INC. IN SUPPORT OF RESPONDENTS


ELIZABETH A. BRENNAN
ROSSBACH BRENNAN, P.C.
401 N. Washington Street
Missoula, Montana 59802
(406) 543-5156

JACK R. TUHOLSKE
*Counsel of Record*
TUHOLSKE LAW OFFICE, P.C.
234 East Pine Street
Missoula, Montana 59802
(406) 721-6986

BRENDA LINDLIEF HALL
REYNOLDS, MOTL & SHERWOOD
401 North Last Chance Gulch
Helena, Montana 59601
(406) 442-3261

*Counsel for Amici Curiae*



COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. Whether a pollutant is "added" to waters of the United States when water containing a pollutant is discharged into a hydrologically distinct body of water with which it would otherwise never intermingle.

2. Whether the United States' contention that an "addition" occurs but once, upon a pollutant's initial entry into a navigable water, is supported by either the text or the purpose of the Clean Water Act.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| INTERESTS OF *AMICI CURIAE* | 1 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 5 |
| CONCLUSION | 15 |

TABLE OF AUTHORITIES

Page

CASES

*Catskills Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001).....3, 5, 8, 9, 10

*Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) .....12

*DuBois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996).....8, 10

*Miccosukee Tribes v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).....1, 13

*National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988).....5, 7, 12

*National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).....5, 7, 12, 13

*Northern Plains Resource Council, Inc. v. Fidelity Exploration & Production Co.*, 325 F.3d 1155 (9th Cir. 2003), *cert. denied* (Oct. 20, 2003).....2, 11

*United States v. Mead Corp.*, 533 U.S. 218 (2001) ..... 6

*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)..... 3

STATUTES

33 U.S.C. § 1251(a) .....3, 5

33 U.S.C. § 1251(g) ..... 4

33 U.S.C. § 1311(a)..... 5

33 U.S.C. § 1342.....5, 12

33 U.S.C. § 1362(12) ..... 5

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 1362(7) ..... 7

33 U.S.C. § 1362(8) ..... 7

OTHER AUTHORITIES

AMERICAN HERITAGE DICTIONARY 394 (2d ed. 1979) ..... 6

Brief Opposing the Petition for the United States as *Amicus Curiae* ..... 14

## INTERESTS OF *AMICI CURIAE*

*Amici Curiae* Tongue & Yellowstone Irrigation District, the Tongue River Water Users' Association, and Northern Plains Resource Council, Inc. respectfully submit this brief supporting the lower court's decision in *Miccosukee Tribes v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).[1] Written consent for *Amici Curiae* participation in this case was granted by counsel of record for the parties and is filed with the Clerk.

*Amicus Curiae* Tongue & Yellowstone Irrigation District (hereinafter "the District") is the holder of the oldest major water right on southeastern Montana's Tongue River, a river that has become the focal point of a debate over the discharge of coalbed methane wastewater. *Amicus Curiae* Tongue River Water Users' Association sells water to the District for irrigation. The District diverts water through the Twelve-Mile Dam into the T&Y Ditch, which provides water to hundreds of irrigators in the lower Tongue River watershed. *Amicus Curiae* Northern Plains Resource Council, Inc. (NPRC) is a nonprofit organization whose members include many farmers and ranchers who irrigate from streams and rivers in southeastern Montana.

*Amici* irrigators have a significant stake in this Court's interpretation of "addition" under the Clean Water

---

[1] In accordance with Supreme Court Rule 37.6, *Amici Curiae* affirm that no counsel for any party in this case authored this brief in whole or in part, and that no persons or entities other than *Amici* or their counsel have made a monetary contribution specifically for the preparation or submission of this brief.

Act. *Amici* were thrust into Clean Water Act litigation when oil and gas producers decided it was economically justifiable to develop the extensive coalbed methane (CBM) reserves in southeastern Montana. CBM development results in the production of massive quantities of salty wastewater from deep underground, which must somehow be disposed of. Fidelity Exploration & Production Company, the first CBM producer in Montana, opted to discharge that wastewater directly into the Tongue River and its tributaries. NPRC filed suit against Fidelity over those unpermitted discharges, and the parties litigated the issue of whether CBM wastewater is a "pollutant" under the CWA. The Ninth Circuit held that it is, and this Court denied Fidelity's petition for certiorari. *Northern Plains Resource Council, Inc. v. Fidelity Exploration & Production Co.*, 325 F.3d 1155 (9th Cir. 2003), *cert. denied* (Oct. 20, 2003).[2] The District and the Association appeared as *Amici* in this Court and the court below.

Because members of *Amici* depend on high-quality surface waters for their livelihoods as ranchers and farmers, they seek the protections afforded to them by the CWA. If EPA's interpretation of "addition" is adopted by this Court, *Amici* fear the long-term effects on their water quality could be disastrous.

---

[2] The production of coal bed methane gas requires dewatering underground aquifers. The pumped ground water is a useless byproduct of the commercial extraction process, and in the *Northern Plains* case was discharged as wastewater into streams and rivers used for irrigation.

## SUMMARY OF ARGUMENT

One of the primary goals of the CWA is to maintain the integrity of the nation's waters. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (noting the overall goal of CWA is to maintain and improve water quality and preserve ecological integrity of our nation's waters). "Addition" must be interpreted consistently with that goal as well as with the plain language of the statute. EPA's interpretation of the "outside world" would allow high-quality waters to be degraded simply because the pollutant being discharged was already contained in waters of the United States. One polluted water could thereafter pollute all other waters, simply because the pollutant was present in a navigable water – regardless of whether the discharged water would ever have reached the receiving water naturally.

The Clean Water Act commands the EPA to not only restore but "maintain" "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). *Amici* urge this Court to respect the plain language of the CWA, and interpret "addition" in a manner that respects both the text of the statute as well as the underlying purpose articulated therein. Although Petitioner and its *Amici* may wish for a different outcome based upon policy grounds, it is not this Court's role to change the meaning of an ordinary word such as "addition" in order to achieve a particular policy goal. As stated by the Second Circuit in addressing this very issue, "Where a statute seeks to balance competing policies, congressional intent is not served by elevating one policy above the others, particularly where the balance struck in the text is sufficiently clear to point to an answer." *Catskills Mountains Chapter of Trout Unlimited v. City of New*

*York*, 273 F.3d 481, 494 (2d Cir. 2001). Section 101(g) of the Clean Water Act[3] may provide sufficient textual support for a policy-based exemption from NPDES permitting for state water management agencies without having to wrest a distorted meaning from the word "addition."

The only contested issues presented herein are whether water that contains a pollutant is "added" to the WCA-3 when discharged through the S-9 pumping station, and if so, whether the statute exempts state-controlled water diversions for water management and flood control. SFWMD may not have created the pollution, but it does discharge the pollutant. CWA liability attaches to dischargers.

*Amici* urge the Court to affirm the Eleventh Circuit on the "addition" issue, and limit any application of section 101(g) to states or governmental entities who are moving water for purely public purposes.

---

[3] Section 101(g) states:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g).

## ARGUMENT

### I. The S-9 Pumping Station "Adds" a Pollutant to WCA-3.

The Clean Water Act (CWA) was enacted to "restore *and maintain* the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (emphasis added). Under the plain language of the Clean Water Act, an NPDES permit is required when (1) a pollutant (2) is added (3) to navigable waters (4) from (5) a point source. 33 U.S.C. §§ 1311(a), 1342, 1362(12); *see also National Wildlife Federation v. Consumers Power*, 862 F.2d 580, 582 (6th Cir. 1988). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *See* 33 U.S.C. § 1362(12).

It is undisputed that water in the C-11 Basin contains higher levels of phosphorus than the WCA-3 receiving water. Whether SFWMD is the actual polluter or not, it is the entity responsible for the discharge of phosphorus into the WCA-3 via a point source. Although SFWMD argues that the point source must add the pollutant, this is an extreme position not supported by the United States and rejected by the Eleventh Circuit herein, the Second Circuit, *Catskills Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001), and the D.C. Circuit, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 175 n.58 (D.C. Cir. 1982).

Thus, four of the five elements required for CWA liability are present: phosphorus is a pollutant, WCA-3 is a navigable water, the S-9 pumping station is a point source, and the pollutant reaches WCA-3 from that point source. The only dispute is whether the pollutant is an "addition."

### A. Common Sense And Science Should Determine "The Outside World."

To "add" means to join or unite. AMERICAN HERITAGE DICTIONARY 394 (2D ED. 1979). Thus, the CWA requires an NPDES permit when a pollutant *joins* a navigable water via a point source. In the words of EPA, an "addition" occurs when a pollutant enters navigable waters from "the outside world." The issue presented by this case is whether "the outside world" is to be defined artificially, based upon the waters' legal status, or by applying common sense aided by rudimentary science.

A definition based entirely upon the waters' legal status is unabashedly, unworkably artificial. Under this view, espoused by the United States herein, liability attaches only once, at the moment a pollutant first enters the waters of the United States:

> The *absence* of the modifier "any" in conjunction with "navigable waters," by contrast, signifies Congress's further understanding that "the waters of the United States" should be viewed as a whole for purposes of NPDES permitting requirements. Once a pollutant is present in one part of "the waters of the United States," its simple conveyance to a different part is not a "discharge of a pollutant" within the meaning of the Act.

Brief for United States Supporting Petitioner at 19 (emphasis in original). This position – never adopted by the EPA in formal rulemaking and therefore deserving of limited deference, *United States v. Mead Corp.*, 533 U.S. 218 (2001) – misreads the plain language of the CWA, and renders the explicit goal of maintaining the integrity of our nation's waters an absurdity.

Waters of the United States include, for instance, the territorial seas. 33 U.S.C. § 1362(7). The territorial seas extend out from the coast for three miles. 33 U.S.C. § 1362(8). Thus, under EPA's analysis, pumping water from the Chesapeake Bay into the James River in western Virginia would not constitute an "addition" of a pollutant – as long as the pipe did not add any pollutants to the water. No matter that salt and nitrogen, among other substances, would be added to the James River *for the first time* – in EPA's view, the important point is that those pollutants are not entering navigable waters for the first time. Once present, they can never be "added" again.[4]

The United States insists that waters that are merely "conveyed" or "connected" should not be subject to NPDES permitting. But unless this approach is restricted within the confines of either the dam cases[5] or section 101(g), its consequences for western irrigators could be disastrous.

As explained by the Second Circuit, this interpretation:

> would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water

---

[4] It is not clear whether, in EPA's view, the receiving water must be the first navigable water to *contain* a pollutant, or the first navigable water into which a pollutant is *discharged*. The distinction is important in the hypothetical given, for salt is not a pollutant in the Chesapeake Bay, but it is most definitely a pollutant in the James River. So at what point is it "added" to navigable waters?

[5] *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).

> from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants. Such an interpretation is inconsistent with the ordinary meaning of the word 'addition.'

*Catskills Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001); *accord DuBois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996).

*DuBois* vividly illustrates the artificiality of EPA's position and the necessity of defining "addition" with at least some relation to the real world. Stream water containing phosphorus as well as the organism *Giardia lambia* was to be pumped (upstream) into a pristine mountain lake, Loon Pond. The pond not only supported a "rich variety of life in its ecosystem" but was also the major source of drinking water for a nearby town. 102 F.3d at 1277. The district court applied the rationale put forth by the EPA herein, i.e., that no "addition" had occurred because the pollutants in the streamwater were already in waters of the United States – even though they would never reach Loon Pond naturally. The First Circuit reversed, holding that there was no basis in law for the lower court's "singular entity" theory. The court noted that under such an interpretation of "addition," the pollution of one navigable water would necessitate all other navigable waters to passively suffer the same fate:

> We can take judicial notice that the Pemigewasset River was for years one of the most polluted rivers in New England, the repository for raw sewage from factories and towns. It emitted an overwhelming odor and was known to peel the paint off buildings located on its banks. Yet, under the district court's theory, even if such conditions still prevailed, a proposal to withdraw

> water from the Pemigewasset to discharge it into Loon Pond would be analogous to moving water from the top to the bottom of a single pond; it would not constitute an "addition" of pollutants "from an external source" because both the East Branch and Loon Pond are part of the "singular" waters of the United States. n30 The district court apparently would reach the same conclusion regardless of how polluted the Pemigewasset was or how pristine Loon Pond was. We do not believe Congress intended such an irrational result.

*Id.* at 1297.

Similarly, in *Catskills*, the Second Circuit noted that if the discharged water and the receiving water are wholly unrelated, it is logical to conclude that the discharge of the former into the latter "adds" to the receiving water:

> [W]ater is artificially diverted from its natural course and travels several miles from the Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility. When the water and the suspended sediment therein passes from the Tunnel into the Creek, an "addition" of a "pollutant" from a "point source" has been made to a "navigable water," and the terms of the statute are satisfied.

*Catskills*, 273 F.2d at 492. In other words, if the two bodies of water are otherwise unrelated, and the hand of man is

responsible for one reaching the other, an "addition" has occurred.

It makes far more sense – and is far more consistent with the letter and the spirit of the CWA – to ask whether the discharged pollutant would reach the receiving water "but for" the point source. This, of course, was the reasoning of the Eleventh Circuit herein, as well as of the First and Second Circuits in *Catskills* and *DuBois*. The fact that the pollutant is contained within water simply makes that determination a hydrological one.

"Hydrological connectivity" alone is not sufficient, however. As was noted by the First Circuit in *DuBois*, two bodies of water may be connected, but fundamental natural laws (such as the fact that water does not flow uphill) dictate whether water from one would ever find its way into the other:

> the Forest Service's "hydrological connectedness" proposal ignores a fundamental fact about water: the direction of flow. It is true that Loon Pond and the East Branch of the Pemigewasset River are "hydrologically connected" in the sense that water from the Pond flows down and eventually empties into the River. *But water from the East Branch certainly does not flow uphill into Loon Pond,* carrying with it the pollutants that have undisputedly accumulated in the East Branch water from some of the other sources of water entering the East Branch from upstream.

*DuBois*, 102 F.3d at 1298 (emphasis added). In other words, the determination of what constitutes "the outside world" begs for a test akin to the test of "reasonableness" in torts – not a hard and fast rule, but one that reflects the

real world. Indeed, courts have repeatedly interpreted the CWA in a fact-specific manner since CWA was passed.

### B. The Court Should Focus on the Presence of a Pollutant Rather than On the Medium In Which It Is Transported.

EPA focuses on the medium in which the pollutant is traveling – water – thereby overlooking the crucial fact that a pollutant, not present in the receiving water, is being discharged into that water. It is as though a water of the United States is the Invisibility Cloak in *Harry Potter* – as long as the pollutant is safely ensconced therein, it is invisible to the CWA. No liability attaches, no NPDES permit is required, and the discharger can discharge to its heart's content.

The fact that it is water being discharged may be relevant from the standpoint of federal deference to state water management; however, it should be wholly irrelevant for purposes of determining whether an "addition" has occurred. If the discharged water is unrelated to the receiving water, then ordinary language forces the conclusion that the joining of the two is an "addition," whether the discharger has "used" the water or not.

As is amply demonstrated by *Amici*'s litigation against the surface-water discharge of coalbed methane wastewater, not all industrial users "use" the water they later discharge. Coalbed methane producers, for example, discharge highly mineralized groundwater into surface waters as an industrial waste, without ever "using" the water in any way. *See Northern Plains Resource Council*, 325 F.3d 1155. The CWA neither requires a discharger to have used the water it is discharging nor to have added

the pollutant contained therein. Instead, the statute looks at whether there is a pollutant, whether it is being "added" to the waters into which it is being discharged, whether those waters are waters of the United States and therefore within federal jurisdiction, and whether the pollutant is discharged from a point source. The fact that the discharge is primarily water should be legally irrelevant. Any interpretation of "addition" must protect these basic textual truths.

### C. If A Levee Is A Dam, *Gorsuch* Controls.

"Additions would probably not be so complicated were it not for the "dam cases." *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). *Gorsuch* holds that water moving through a dam is not "added" to the water below the dam, while *Consumers Power* holds that materials already present in the water above the dam do not become pollutants simply because they are transformed by the dam. The plaintiffs' arguments in these cases made superficial sense: here is a body of water, here we've added a dam, and now the body of water has pollutants in it because of the dam. Such a scenario appears to fit all the criteria of § 1342.

Based largely upon *Chevron*-style deference to the EPA, which argued that dams do not require NPDES permits, both Courts of Appeals came to the same conclusion: the water going in and the water coming out are the same, therefore there is no "addition." *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Unless this Court chooses to overrule them, the dam cases establish an important parameter of the "addition" test: If

the water merely passes through a point source, then nothing is "added" and no NPDES permit is required.

The levees and the pump station herein are closely analogous to a dam. *See, e.g.*, http://www.sfwmd.gov/gover/s_9final/presskit/p_kit.html (photographs of the S-9 pumping station and adjoining waterways). As found by the lower court:

> Both the C-11 Basin and the WCA-3A were part of the historical Everglades. Before construction of the C-11 Canal, the Levees, and the S-9 pump station, the surface and ground waters on both side of the Levees intermingled. The natural flow of the waters at that time was a southerly moving sheet of water. *But for man's intervention, these waters would essentially be a single body of navigable water.*

*Miccosukee*, 280 F.3d at 1369 n. 8 (emphasis added). To say that but for man's intervention two bodies of water would be one is to describe a dam. A dam creates a reservoir, and releases water downstream through a spillway. The water quality of the reservoir may be completely different than the water quality of the downstream river. The state may even develop separate TMDLs (total daily maximum loads) for the different stretches of river. Nonetheless, under the established law of the dam cases, the dams do not "add" pollutants to the river.

Thus, if the levees herein are essentially dams, and the water in both the C-11 Basin and the WCA-3 are essentially the same, *Gorsuch* holds that no addition can occur. Importantly, it would be unnecessary to make any holding regarding conveyances of water between two distinct water bodies.

On the other hand, as Respondents and other *Amici* urge, if the S-9 pump station is not a dam but rather a means to convey water from one distinct water body to another, then an "addition" has occurred. The Circuit Court's holding that the water bodies herein are distinct emphasized the fact-intensive nature of such a determination. As such, of course, it is a determination best left to the lower courts.[6]

Finally, it is important for this Court to keep in mind that if the lower court's decision is upheld, it does not mean the water management agency will be prevented from accomplishing its task. This point was amply made by the United States in its brief opposing certiorari. *See, e.g.,* Brief Opposing the Petition at 17 ("it appears at least questionable that the NPDES permit would subject petitioner to any significant environmental obligations beyond those that petitioner already faces under other existing laws"); 18 ("[the NPDES permitting] process appears unlikely to result in any change in the operation of the pumping station or to subject petitioner to additional

[6] In its brief opposing the Petition for Certiorari, the United States noted that:

> Although the lower court's characterization of the water control facilities at issue as creating distinct bodies of water for CWA purposes may be incorrect, the correction of that error – which would turn on the characteristics of a number of special statutes, the historic and current hydrology of the Everglades, and characteristics of the water control facilities themselves – would involve a fact-intensive examination of record and non-record material in light of the interlocking framework of federal and state laws that govern water resources in the Everglades region.

Brief Opposing the Petition for the U.S. as *Amicus Curiae*, at 14.

pollution control requirements beyond those currently required or planned under federal or state law."). Congress has determined that the NPDES permit system is the cornerstone of the CWA, and this Court should not disturb that law or its common-sense administration.

## CONCLUSION

EPA's contention that a pollutant can be added but once to navigable waters is artificial, unworkable, and undermines the explicit goal of the CWA to maintain as well as restore water quality. *Amici* respectfully urge this Court to recognize the peril created by such a situation. If the waterbodies herein are distinct, a pollutant can be "added" even though both waterbodies are navigable waters of the United States. If they are a single waterbody, then the dam cases control and no "addition" can occur when the discharged water and the receiving water are one and the same. Alternatively, although not addressed by *Amici*, section 101(g) may require substantial deference be paid to state water managers.

For the foregoing reasons, *Amici* respectfully urge the Court to affirm the lower court's decision regarding the "addition" of a pollutant.

Respectfully submitted,

ELIZABETH A. BRENNAN
ROSSBACH BRENNAN, P.C.
401 N. Washington Street
Missoula, Montana 59802
(406) 543-5156

JACK R. TUHOLSKE
*Counsel of Record*
TUHOLSKE LAW OFFICE, P.C.
234 East Pine Street
Missoula, Montana 59802
(406) 721-6986

BRENDA LINDLIEF HALL
REYNOLDS, MOTL & SHERWOOD
401 North Last Chance Gulch
Helena, Montana 59601
(406) 442-3261

*Counsel for Amici Curiae*